

1 ELLEN SUE KATZ, AZ Bar. No. 012214
2 WILLIAM E. MORRIS INSTITUTE FOR JUSTICE
3 3707 North Seventh Street, Suite 300
4 Phoenix, Arizona 85014-5095
5 (602) 252-3432
6 eskatz@qwestoffice.net

7 IN THE SUPREME COURT

8 STATE OF ARIZONA

9 PETITION TO ADOPT RULES OF
10 SMALL CLAIMS PROCEDURE AND
11 TO MODIFY RULE 101(b) OF THE
12 JUSTICE COURT RULES OF CIVIL
PROCEDURE (SECOND AMENDED)

Supreme Court No. R-18-0021

**Comments to Third Amended Petition
to Adopt Rules of Small Claims
Procedure and to Modify Rule 101(b) of
the Justice Court Rules of Civil
Procedure**

13 Pursuant to Rule 28 of the Rules of the Supreme Court, the William E. Morris
14 Institute for Justice (“Institute”) respectfully submits these comments to the Court
15 concerning the Third Amended Petition to Adopt Rules of Small Claims Procedure and to
16 Modify Rule 101(b) of the Justice Court Rules of Civil Procedure. The Institute
17 previously filed comments to a set of draft rules, the Amended Petition, and the Second
18 Amended Petition. We support the proposal for Rules for Small Claims Procedure but
19 have remaining concerns.

20 **I. Statement of Interest**

21 The Institute is a non-profit program that advocates on behalf of low-income
22 Arizonans. The Institute has historically had an interest in the rights of unrepresented
23 litigants in court.

24 In reviewing the Third Amended Petition, we remain concerned that the rules’
25 primary focus is simply to resolve cases quickly and do not provide unrepresented
26 litigants with the time they may need to accomplish the litigation tasks or to fully
27 understanding the small claims court process. This is reflected in several provisions of
28 the rules and in the form notice provided to plaintiffs and defendants. We provide

1 feedback to the changes to the rules as presented in the Third Amended Petition and
2 reiterate many concerns previously discussed in our prior comments.

3 **II. Requirement that Defendant File an Answer**

4 The Third Amended Petition requires defendants to file an Answer. Rule 9. The
5 Institute supported the provision in prior draft rules that an answer was not required. The
6 Committee notes that an answer is required so that the court and the plaintiff “know
7 whether the defendant will appear and defend the case” and for a trigger to set the
8 hearing. Third Amended Petition, page 10. If an answer is required, defendants should
9 be given more than 20 days to file. We suggest that a defendant have at least 35 days to
10 file an answer or counterclaim. This will give these unrepresented litigants more time to
11 consult with an attorney, gather documents and talk to witnesses. If more time is not
12 given, then as noted below they should be able to request an extension of time to file an
13 answer and counterclaim.

14 **III. Notice to the Plaintiff and Defendant**

15 As noted above, the Third Amended Petition requires defendants to file an
16 Answer. Rule 9. This information has been added to the Notice to the Plaintiff and
17 Defendant. Notice, ¶ 10. We agree this information should be included in the Notice but
18 are concerned that the information does not properly describe to defendants what
19 constitutes an answer. Unrepresented defendants have little or no prior exposure to the
20 judicial process and may not fully understand what it means to prepare and file an
21 answer. Unrepresented defendants may be intimidated and overwhelmed by the mere
22 idea of preparing an answer and decide not to file one, allowing the plaintiff to win by
23 default. To ensure these unrepresented defendants understand and comply with the rules,
24 the Institute recommends providing a clear explanation of what an answer is in paragraph
25 10 of the Notice. The explanation in the Notice should be in bold and underlined font.
26 The Notice should also inform the defendant that a form answer and counterclaim are
27 posted on the court’s website.

28 ///

1 We also renew our prior objections to the Notice that the font remains too small,
2 and there should be language that makes it clear the party *must* file a request to transfer
3 the case to justice court, if the party wants the right to a jury trial, the right to appeal, or
4 any of the other rights not available in small claims cases. We strongly recommend
5 inclusion of the following language after paragraph 4 in bold: “**If defendant wants any**
6 **of the above rights, you must file a request to transfer the case to the regular civil**
7 **division of the justice court at least 10 days prior to the hearing date.**” We also again
8 suggest that the Notice explain the benefits of attending the hearing.

9 **IV. Other Issues Raised in Prior Comments**

10 The proposed rules continue to have several outstanding issues and we reiterate
11 the concerns raised in our prior comments.

12 **A. Failure to Allow Extensions of Time to File Proof of Service of Process,** 13 **Answer and Counterclaim**

14 The proposed rules do not allow the parties to request additional time for plaintiffs
15 to file proof of service of process or for defendants to file an answer or a counterclaim.
16 Rules 7(c), 9, 11(b). This lack of any filing extensions may create hardships for
17 unrepresented litigants navigating the small claims court process alone, particularly those
18 running up against deadlines. As an example, if the plaintiff fails to file proof of service
19 within 45 days of filing the lawsuit, the case can be dismissed. Rule 7(a). Similarly,
20 defendants only have 20 days to file an answer or a counterclaim, and if they fail to do so,
21 the plaintiff may file a motion for a default judgment. Rule 9. Due to unforeseen
22 circumstances, such as a major illness, death in the family or work obligations, the parties
23 may need additional time to file proof of service, an answer or counterclaim. The
24 Institute suggests the rules include provisions to allow plaintiffs and defendants to ask for
25 more time to file proof of service of process, answers and counterclaims.

26 **B. Failure to Allow Amendments to Pleadings**

27 The proposed rules continue to not allow plaintiffs to make amendments to
28 complaints, or defendants to amend counterclaims. Rules 6(c), 11(d). The disallowance

1 of amendments may create difficulties for plaintiffs and defendants who run up against
2 the statute of limitations or other court deadlines. We once again propose that the rules
3 allow amendments to these pleadings for “good cause.”

4 **C. When the Defendant Fails to Appear at the Hearing**

5 Rule 14(c)(2) provides that if the defendant fails to appear at the hearing the “court
6 will consider the plaintiff’s evidence.” Even when a defendant fails to appear at the
7 hearing, in addition to filing an answer, they may have submitted evidence to the court
8 prior to the hearing. We recommend that the rules be amended to require the court to
9 consider any evidence submitted by the defendant and the defendant’s answer as well as
10 the plaintiff’s evidence.

11 **D. Conduct of Hearings/Telephone Appearances**

12 Proposed Rule 14 governs how small claims hearings are to be conducted and fails
13 to allow the parties to object to documentary and witness evidence the other party wants
14 to use at the hearing, and only allows the parties to ask questions of each other and any
15 witness under the discretion of the justice or hearing officer. Rule 14(e). The Institute
16 reiterates its suggestion to allow parties to object to evidence and testimony and to allow
17 them to ask witnesses and the other party questions.

18 Rule 14 also provides that a party may appear by telephone “if the court allows
19 telephonic appearances.” Rule 14(d). We continue to recommend that *all* courts allow
20 for telephonic appearances, and that this not be discretionary with each court.

21 **E. Requests for “Special” Accommodations and Interpreters**

22 The Third Amended Petition did not change the requirement that requests for
23 interpreter services or “special” accommodations “should” be made at least 15 days prior
24 to the hearing. Rule 16. As the Institute explained in prior comments, courts must grant
25 requests for interpreters and reasonable accommodations at all times under Title VI of the
26 Civil Rights Act, 42 U.S.C. § 2000d (language services) and the Americans with
27 Disabilities Amendment Act of 2008, 42 U.S.C. § 12101 *et seq.*, § 12131 *et seq.*
28 (reasonable accommodations), and, as such, suggested deadlines are not appropriate or

1 lawful. We continue to recommend that the small claims rules be amended to mirror
2 federal requirements and state that requests for reasonable accommodations and
3 interpreters should be made as soon as practicable.

4 **F. Information Disclosure**

5 The proposed rules provide that “[a]ll parties should provide the court with a
6 physical address, email address, and phone number, if available” so the court can
7 communicate with them. Rule 3. The Institute has continuously objected to prior
8 versions of the rule and requested that the court allow litigants to provide personal
9 contact information in alternate formats, by alternate methods, and to keep their
10 information confidential. Our concerns remain, and we repeat our recommendations.

11 **G. Failure to Have a Rule or Instruction on How to Issue a Subpoena**

12 The proposed rules continue to have no provision or instruction that explains the
13 process for requesting a subpoena for witness testimony or for the production of
14 documents. The Institute renews its previous objection to this omission and recommends
15 that the rules include a provision to explain to litigants the necessary steps to get a
16 subpoena issued.

17 **Conclusion**

18 For all the above reasons, the Institute requests that the Court approve the Third
19 Amended Petition with the recommendations explained above. Without the above
20 requested changes, the rules may negatively impact the rights of unrepresented litigants
21 in small claims court and prevent plaintiffs and defendants from having their day in court.

22 Respectfully submitted this 27th day of June 2019.

23 WILLIAM E. MORRIS INSTITUTE FOR JUSTICE

24
25 By /s/Ellen Sue Katz

26 Ellen Sue Katz

27 3707 North Seventh Street, Suite 300

28 Phoenix, Arizona 85014-5095

1 Original electronically filed with the
2 Clerk of the Supreme Court of Arizona
3 this 27th day of June 2019.

4 By: /s/ Ellen Sue Katz